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Case No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1982

In Re: ALWIN E. HOFFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN,

Petitioners

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS AND/OR INJUNCTION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

PETITION

Laurence A. Elgin
Suite 705
1000 16th Street, N.W.
Washington, D.C. 20036
(202) 857-0073
Attorney of Record

Frederick A. Goldstein
Suite 200
2640 Hollywood Blvd.
Hollywood, Florida 33020
(305) 925-3358

QUESTIONS PRESENTED

1. Whether the lower courts are depriving petitioners of their constitutional and statutory rights by delay and avoidance.

2. Whether the lower courts are declining improperly to carry out their duty to protect the petitioners from overt and evident ongoing violations of their rights by state officials pending the outcome of the pending litigation.

3. Whether this Court should exercise its jurisdiction to compel adherence to Article I, Section 4, Clause 1 of the Constitution of the United States by the state and party officials of Massachusetts who, in ignoring that mandate, have defied their own legislature and deprived petitioner HOPFMANN of his rightful place on the ballot as a democratic candidate for Senator in congress, the only man in Massachusetts history to be so denied that right and

have deprived the other petitioners of their right to vote as they choose for a candidate of their choice, in order to protect the rights of petitioners and the appellate jurisdiction of this Court and the jurisdiction of the lower courts and the Congress.

4. Whether this Court should exercise its jurisdiction to prevent the defendant democratic party of Massachusetts from using the Attorney General of the United States to mount a collateral attack upon the jurisdiction of the lower courts.

DEFENDANTS IN THE COURT BELOW

The defendants in the court below are:

1. MICHAEL JOSEPH CONNOLLY, individually and as Secretary of State of the Commonwealth of Massachusetts;

2. FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts;

3. CHESTER G. ATKINS, Chairman of the Democratic State Committee of Massachusetts, which is the governing body of the state democratic party; and

4. THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS.

OTHER RESPONDENTS

The other respondents, against whom injunctive relief is sought by means of a

writ from this Court directing or effecting the same in order that the appellate jurisdiction of this Court might be preserved are:

1. WILLIAM FRENCH SMITH, the Attorney General of the United States, from whom the defendant below, THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS, has sought a waiver, as provided for by the Voting Rights Act of 1965, 42 USC 1973, et seq., of the "preclearance" requirement of Section 5 of that Act, 42 USC 1973c, and 28 C.F.R. 51 as amended;

2. MARCIA MOLAY, the Director of Elections of Massachusetts, whose office is contained in that of defendant below, MICHAEL JOSEPH CONNOLLY, and who actually signed the letter locking petitioner ALWIN E. HOPFMANN off the ballot;

3. EDWARD F. HENNESSY:

4. HERBERT P. WILKINS;

5. PAUL J. LIACOS

6. RUTH I. ABRAMS;

7. JOSEPH NOLAN;

8. NEIL LYNCH;

9. FRANCIS O'CONNOR, the seven justices of the Supreme Judicial Court of Massachusetts who issued the Advisory Opinion to the Governor on April 23, 1982, which was used as the justification by defendant below, MICHAEL JOSEPH CONNOLLY, for locking petitioner HOPFMANN off the ballot for the September 14, 1982 statewide primary election in Massachusetts, and who also directed the Assistant Clerk of their court to enter the Order of July 6, 1982, in Frederick C. Langone, et al., SJC-2889, the state court case to which the court below deferred without right or justification as petitioners contend.

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PETITION FOR WRIT OF PROHIBITION
AND/OR MANDAMUS AND/OR INJUNCTION

I. PRAYER

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN, petitioners herein by Frederick A. Goldstein and Laurence A. Elgin, their attorneys, petition this Court to issue a Writ of Prohibition and/or Mandamus and/or Injunction directed to the Honorable Frank M. Coffin, the Honorable Walter Jay Skinner and the Honorable John J. McNaught, judges of a district court of three judges of the United States District Court for the District of Massachussets, formed pursuant to 42 USC 1973c and 28 USC 2284, and to the Honorable John J. McNaught, also, as a single judge of the United States District Court for the Eastern District of Massachusetts.

II. REPORT OF OPINION BELOW

There is, as yet, no written opinion below. The United States District Court has delayed a hearing on the merits for reasons that the petitioners feel are spurious and unjustified. Though a hearing prior to the September 14, 1982 statewide primaries in Massachusetts was mentioned by the lower court, no such hearing was, in fact, granted. Petitioners requested relief in their initial complaint, filed June 3, 1982, which, in part, required action before that September 14, 1982, date and the Court below well knew this. The Court below first delayed any decision in order to await a decision of the Supreme Judicial Court of Massachusetts which could not have been binding or controlling and then, subse-

quently, denied the preliminary relief sought to protect against the possibility of delay being used by the lower court in order to avoid a decision by enabling arguments of mootness. Preliminary relief thus sought was denied by both the three judge court below in a Memorandum and Order dated July 7, 1982, and then by the single judge court by another Memorandum and Order on the same day. Appeals to single justices of this Court for preliminary relief were denied without comment on July 9, 1982. Appended hereto are:

1) The "MEMORANDUM AND ORDER ON REQUEST FOR THE CONVENING OF A THREE-JUDGE COURT" dated June 22, 1982, and signed by Judge McNaught of the lower court in Civil Action No. 82-1530-MC,

in which he decided to delay any action until a case then pending in the Supreme Judicial Court of Massachusetts, Frederick C. Langone, et al. v. Secretary of the Commonwealth, et al., was decided (See Appendix A);

2) The Advisory Opinion of the Supreme Judicial Court of Massachusetts entitled "Opinion of the Justices to the Governor," and dated April 23, 1982, (385 Mass. 1201 91982)), which was both the justification used by the Massachusetts Secretary of State in denying ballot access to petitioner HOPFMANN and the justification used by the Supreme Judicial Court of Massachusetts for its subsequent order entered in Frederick C. Langone, et al. v. Secretary of the Commonwealth, et al. SJC-2889, on July 6, 1982 (See Appendix F);

3) The Order of the Supreme Judicial Court of Massachusetts so entered in Langone, supra, on July 6, 1982. No opinion as promised in the Order has yet been issued. Langone was a lieutenant-gubernatorial candidate. (See Appendix G);

4) The MEMORANDUM AND ORDER DENYING PRELIMINARY INJUNCTION and the other requested preliminary relief issued by the three judge lower court July 7, 1982, one day after the state court's Order in Langone, supra, (See Appendix B);

5) The MEMORANDUM AND ORDER issued by the Honorable John J. McNaught as a single judge court, also on July 7, 1982, denying all requested preliminary relief (See Appendix C);

6) The denial of a preliminary stay issued by Mr. Justice Brennan of

this Court on July 8, 1982 (See Appendix D);

7) The denial of a preliminary stay issued by Mr. Justice Rehnquist of this Court on July 9, 1982 (See Appendix E).

III. JURISDICTION

Jurisdiction to grant the writs of prohibition, mandamus and injunction is within the inherent power of this Court as codified by 28 USC 1651(a). The relief historically extended under the writs of prohibition, mandamus and injunction is undisturbed by abolition of the writ by Rule 81(b) of the Federal Rules of Civil Procedure which affected only the procedure to be employed. Leyerchak v. Hiatt (1948 D.C.Pa.) 7 FRD 726. Jurisdiction is further conferred by Rule 26 of this Court.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. CONSTITUTIONAL PROVISIONS

1. Article I, Section 4, Clause 1.

2. Amendment XVII, Clauses 1 and 2.

3. Article I, Section 5, Clause 1.

4. Article IV, Section 2, Clause 2.

5. Amendment IX.

6. Amendment X.

7. Article VI, Clause 2.

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chusetts, Chapter 53, Section 44.

13. Annotated Laws of Massachusetts, Chapter 53, Section 45.

14. Annotated Laws of Massachusetts, Chapter 53, Section 46.

15. Annotated Laws of Massachusetts, Chapter 53, Section 47.

16. Annotated Laws of Massachusetts, Chapter 53, Section 48.

17. Annotated Laws of Massachusetts, Chapter 53, Section 2.

18. The Civil Rights Act of 1871, 42 USC 1983.

19. 28 USC 1652.

20. Federal Election Campaign Act of 1971, as amended, the following sections:

a) 2 USC 431(1)A

b) 2 USC 431(1)B

c) 2 USC 431(2)

d) 2 USC 431(3).

21. 42 USC 1971(b) and (c).

22. 2 USC 431(3).

The constitutional and statutory provisions relied upon are too lengthy to be included in the body of this petition. Therefore, they have been included in the Appendix as Appendix N.

V. STATEMENT OF THE CASE

1. This petition is filed pursuant to the authority to issue extraordinary writs vested in this Court by the provisions of Section 1651(a), Title 28, United States Code, and Rule 26 of the Rules of this Court, in order to compel a hearing and decision by the Honorable Frank M. Coffin, the Honorable Walter Jay Skinner, and the Honorable John J. Mc Naught constituting a three judge court of the United States District Court for the District of Massachusetts, and the Honorable John J. McNaught as a single judge of that Court of the violations of the Constitution of the United States and certain laws enacted pursuant thereto, namely, 42 USC 1983, which have been alleged below and other violations of the Constitution related thereto which

are evident from the facts and are specified herein, as they apply or should have been applied to petitioners and to prohibit deprivation by the same Honorable Judges of certain basic constitutional rights of the petitioners and of their constitutionally guaranteed liberties without due process, namely the right of petitioner HOPFMANN to run for office of United States Senator in accord with the prescription of his state's legislature and in free association with the political party of his choice and in exercise of his constitutional liberties, and of petitioners HESSION, PERKINS, PAULIN and SULLIVAN to vote for a candidate of their choice who has duly qualified as a candidate under the prescription of the elected legislature of their state, and in exercise of their constitutionally

guaranteed liberties through delay and inaction, the action and inaction from which relief is sought having occurred in Civil Action No. 82-1520-MC in the courts below, and to enjoin certain acts by the defendants below as well as by the Justices of the Supreme Judicial Court of Massachusetts and the Attorney General of the United States, in order to preserve the appellate jurisdiction of this Court and to protect the rights of petitioners. Memoranda and Orders which have either occasioned delay and thereby threatened petitioners' constitutional rights or which have refused relief that would preserve petitioner's constitutional rights and the appellate jurisdiction of this Court have been set out in the Appendix as described in II above.

2. There are also included in the Appendix, in addition to the documents set out in II above, the texts of the following papers which are essential to an understanding of this Petition:

8) House Bill 5852 of 1982 by which the Massachusetts legislature attempted vainly to assert its constitutional right to prescribe the manner in which Senatorial candidates would be nominated by reaffirming existing law notwithstanding party charter provisions (See Appendix I);

9) The provision of the charter of the Massachusetts Democratic Party, Article Six, Section III, propounded by the state party in 1981 and officially adopted at the party's pre-primary convention in May, 1982, in which the party first presumed to control ballot access

for the primary (See Appendix H);

10) Receipt for nomination papers issued to petitioner HOPFMANN by the Office of the Massachusetts Secretary of State acknowledging 10,798 certified signatures filed and noting petitioner "not yet on ballot: Reason: Democratic Charter." (See Appendix J);

11) Letter of May 28, 1982 from Marcia Molay, Director of Elections in the Office of the Massachusetts Secretary of State, Michael Joseph Connolly, to petitioner HOPFMANN, denying him a place on the ballot because of the April 23, 1982 Opinion of the Justices and the party charter (See Appendix K);

12) Letter of July 6, 1982 from James F. Schoener, of the firm of Miller, Canfield, Paddock and Stone, counsel of record below, to David R. Hunter, Voting

Section, Civil Rights Division, United States Department of Justice, objecting to a submission by the Democratic Party of Massachusetts during the pendency of the proceeding below to the Department of Justice for a highly irregular expedited waiver of the preclearance requirements of the Voting Rights Act of 1965, 47 USC 1973c (See Appendix L);

13) The "SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT" under 42 USC 1973c (1981) and 28 CFR 51 as amended by 46 Fed. Reg. 870 (1981) made to the United States Department of Justice by James Roosevelt, Jr., Legal Counsel, on behalf of the Democratic State Committee of the Commonwealth of Massachusetts which prompted the letter of James F. Schoener (See Appendix M).

3. Petitioner HOPFMANN is a lifelong citizen and resident of the United States and of the Commonwealth of Massachusetts who is over thirty years of age and who complied in a timely fashion with all the requirements prescribed by the laws of his state as passed pursuant to the mandate of the Constitution of the United States, Article I, Section 4, Clause 1, entitling him to be placed on the state primary ballot as a candidate for nominee of the democratic party for the office of United States Senator from Massachusetts. Petitioner HOPFMANN was, therefore, entitled to have his name on the ballot as a democratic nominee for United States Senator at the state primary held in Massachusetts on September 14, 1982.

4. Petitioners HESSION, PERKINS, PAULIN and SULLIVAN are enrolled Democratic voters and citizens and residents of the United States and Massachusetts who wished to exercise their right to vote for petitioner HOPFMANN as a duly qualified democratic candidate for United States Senator from Massachusetts of their choice and that of others of their party in the statewide primary held on September 14, 1982. They still wish so to vote.

5. In 1981, the Massachusetts State Democratic Party propounded a "charter" which provided for a pre-primary convention to be held in May of each election year. Previously, such conventions had been held from time to time for the purpose of endorsing candidates but such endorsements had not controlled access by candidates to the primary ballot. In the Charter it was propounded for the first time that at the pre-primary convention in May, in addition to the party endorsement, there would be a proviso that any candidate receiving at least fifteen percent (15%) of the votes of the delegates to the convention "may challenge the Convention endorsement" at the State Primary Election.

6. The State Democratic Party attempted without success to get the

Massachusetts legislature to prescribe nomination procedures in accord with this Charter provision. Instead, the legislature passed a bill, House No. 5852 of 1982, which sought to clarify the existing statutes even further to make it clear that:

> "Notwistanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary." (emphasis added).

7. The Governor of Massachusetts submitted the bill to the Justices of the state's highest court, the Supreme Judicial Court of Massachusetts, for an advisory opinion under a statutory procedure, asking two questions, as set out by the justices in

their opinion. They were, essentially: (a) did the new provision of the "Charter" propounded by the State Democratic Committee supersede the existing law; and (b) would enactment of the bill allow ballot access to the democratic primary ticket by the existing statutory route of filing nomination papers regardless of the new fifteen percent (15%) rule in the party charter.

8. The justices of the Massachusetts court, in an advisory opinion dated April 23, 1982, declined to answer the first question and answered "yes" to the second, but took the opportunity to announce that, in their opinion, the democratic party's newly adopted fifteen percent (15%) rule was the exclusive way for a democratic candidate to get access to the ballot and that to hold otherwise was unconstitution-

al because the existing statutory procedure of collecting 10,000 signatures, with which petitioner HOPFMANN complied, violated the "freedom of association" of the Massachusetts democratic party.

9. The advisory opinion never mentioned any actual constitutional provisions such as those cited in this petition, particularly Article I, Section 4, Clause 1, and so did not interpret the Constitution of the United States but rather selectively seized upon a purported extension of First Amendment rights to use as a justification for interfering with the constitutionally mandated prescription of the state legislature. In addition, petitioners argue that the state court had no jurisdiction or authority to render the decision it did render, that the

decision is based on a false assumption, i.e., that a political party has constitutional rights which allow it, in the name of "freedom of association" to deprive its own members of constitutional rights, and the decision is, therefore, void, and further that the decision is in error in violating the due process rights of petitioners.

9. Not quite a month later, on May 21, 1982, the state democratic party met in pre-primary convention for two days. At the start of the pre-primary convention the party officially adopted the "15% rule" propounded earlier in the party charter. By this time it was too late under Massachusetts statutes for petitioner Hopfmann to run as an independent, even had he wished to do so.

10. On May 25, 1982, Chester Atkins,

Chairman of the Democratic State Committee, informed Michael Joseph Connolly, the Secretary of State of Massachusetts, of those candidates who had been endorsed by the democratic party pre-primary convention, or who had met the 15% rule by getting that percentage of the convention vote. Petitioner Hopfmann's name was not included.

11. Petitioner Hopfmann was at the democratic pre-primary convention and received approximately two percent (2%) of the vote for the nomination for United States Senator.

12. On May 28, 1982, petitioner Hopfmann filed the necessary nomination papers required by Massachusetts law and received a receipt therefor.

13. On May 28, 1982, Michael Joseph Connolly's Office, through the Director

of Elections, Marcia Molay, informed petitioner Hopfmann that his name would not be placed on the ballot for the statewide primary on September 14, 1982, relying on the advisory opinion of April 23, 1982, and the newly adopted 15% rule of the democratic party charter.

14. On June 3, 1982, petitioners filed their COMPLAINT FOR DECLARATORY JUDGMENT, MANDAMUS AND INJUNCTIVE RELIEF in the court below.

15. On June 22, 1982, the lower court, despite the fact that in the state proceeding no mandate of the United States Constitution, such as that of Article I, Section 4, Clause 1, was involved, decided to defer any action until the Supreme Judicial Court of Massachusetts could decide on a complaint filed by two lieutenant-gubernatorial candidates.

16. On July 6, 1982, the Supreme Judicial Court of Massachusetts, in docket number SJC-2889, the case of Frederick C. Langone, et al. vs. Secretary of the Commonwealth, et al., Langone being one of the lieutenant-gubernatorial candidates heretofore mentioned, issued an Order, through one Frederick J. Quinlan, Assistant Clerk of that court, ruling that the 15% rule of the democratic party charter would prevail, rather than the statutes of Massachusetts as duly passed by the elected legislature of the state. In issuing the Order, the court said: "... we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary must give effect to the relevant charter provisions." The court noted that an opinion or opinions would follow. So far none has.

As in the earlier Advisory Opinion to the Governor, no mention was made of federal constitutional rights or provisions which would contravene the position taken.

17. On July 7, 1982, the lower courts, both three-judge and single-judge, denied the requested preliminary relief in Memoranda and Orders which pointedly avoided the allegations under Article I, Section 5, Clause 1, raised in Count II of the Complaint below.

18. On July 8, 1982, two single justices of this Court denied preliminary relief, sought pursuant to a request for stay, without comment.

19. In an undated request, while the case in the lower court was pending, one of the defendants below, THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS, acting through its Legal Counsel, James

Roosevelt, Jr., as if it were a governmental entity, made a submission under Section 5 of the Voting Rights Act of 1965, 42 USC 1973c, seeking a waiver of the "preclearance" normally required by that section of the Act from the United States District Court of the District of Columbia when a state is "covered" in terms of that Act as Massachusetts is. This request was submitted at a lower level of the Department of Justice to a known "friend" and unusual expedition (24 hours) was requested. Petitioners believe that the intent of this unusual request was to mount a collateral attack upon their position in the court below by seeking the imprimatur of the Attorney General, without his actual knowledge thereof, upon changes made by a political party in a state's voting laws.

20. Learning of this move, petitioners, through their counsel, wrote an appropriate official in the Department of Justice on July 6, 1982, and pointed out the substantive reasons why this request, which petitioners believe to have been an improper collateral attack, should be denied, even if procedurally proper, which petitioners deny that it is. As far as petitioners know, this request for a "preclearance" waiver is still pending before the Attorney General.

21. Under the theory of Kusper v. Pontikes, 414 U.S. 51 (1973), 38 L.Ed. 2d 260, 94 S. Ct. 303, that political parties can, in an unconstitutional fashion, so interfere with voting rights that they can lock an individual off of a ballot or away from his right to vote and can confine an individual from his constitutionally

guaranteed liberties, the petitioner ALWIN E. HOPFMANN then filed a Petition for a Writ of Habeas Corpus with the Court on September 20, 1982, requesting that petitioner Hopfmann be freed of the restraints imposed upon his liberty by these unconstitutional acts of the defendants below and that his liberty be restored by means of a new special primary to be held between himself and the candidate of the democratic party of Massachusetts for Senator in Congress, Edward M. Kennedy, that primary to be held on October 5, 1982.

22. Concurrently with the filing of this Petition, petitioners will be moving for an expedited hearing on the merits in the court below, although petitioners do not expect the court below to act expeditiously without the issuance of writs from this Court because the court below

was asked in the Complaint to act before September 14, 1982, and declined to do so. It should be pointed out that Edward M. Kennedy, the opposing candidate who was enabled to run unopposed by the acts complained of herein, of which he was aware, as a United States Senator participated in the appointment of the judges in the court below and that special care should be taken in this instance to avoid even the appearance of that type of relationship which led to the recusal of the judge in United States v. Moore (1976, DC W Va) 405 F Supp 771, lest the honor of the courts be undermined in the eyes of the citizenry and their faith in the courts shaken.

23. As a result of these actions and inactions, petitioners believe that petitioner ALWIN E. HOPFMANN has been deprived of his constitutional right to be on the ballot of the recently held statewide primary in Massachusetts in accordance with the prescription of the legislature of his state as expressed by the members of that legislature, elected by the people of his state, in the laws which they have passed, having, as he did, met every qualification so laid down by the legislature in those laws. Further, petitioners believe that any power to regulate elections which may not have been prescribed by the legislature of Massachusetts or made or altered by the Congress of the United States resides in the people under the Ninth Amendment or in the people or the state of Massachusetts

under the Tenth Amendment, and that Senators are to be elected by the people in accordance with the Seventeenth Amendment. There is no valid construction of the Constitution which can place this power in the hands of the leadership of a political party or any convention which such leaders might hold when a state's legislature has prescribed otherwise. In the present instance, petitioners contend, the power to prescribe who is to be on the ballot at the statewide primary has been exercised by the legislature of Massachusetts and the Congress has not chosen to alter that prescription. The defendants below and the other respondents named in this petition have, however, with varying degrees of complicity, participated, in some cases advertently, and, in other cases, inadvertently, in an

effort to defeat that prescription and subvert the clear constitutional mandate behind it. For whatever reason, the federal courts, so far, at any rate, have seen fit to ignore this abrogation of fundamental rights and not provide that relief which it is their duty to provide and which is indeed the justification for their existence.

24. Further, petitioners believe, for the same reasons, that the petitioners GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN, who are registered democrats, have a right to vote for a candidate of their choice within their party who has duly qualified under the prescription of the Massachusetts legislature and to have their chosen candidate on the ballot when he has met the requirements set out by the legislature in the laws.

25. Petitioners believe that they have a right to have the Constitution of these United tates and the laws passed in pursuance thereof be the supreme law of the land in accordance with Article VI, Clause 2 of the Constitution, and that no political party can presume to make any rule which is superior to the Constitution or any prescription, such as that of the Massachusetts legislature in this instance, which the Constitution mandates. Petitioners believe also, in accord with that constitutional clause, that the justices of the Massachusetts Supreme Judicial Court are bound by the clear provisions of Article I, Section 4, Clause 1, and that their advisory opinion in this instance, in purporting to have any validity with regard to senators or representatives in the Congress of the

United States, as it must be construed, since those offices are so prominently included in Chapter 53 of the Annotated Laws of Massachusetts, as offices regulated by that chapter, have exceeded their authority. The justices made no attempt in their advisory opinion to consider these federal elected offices separately from the other offices regulated by the prescription of Chapter 53. This was so even though the justices of the Supreme Judicial Court, as "judicial officers" of one of the "several States, are bound by 'Oath of Affirmation' to support the Constitution; ..." as demanded by Article VI, Clause 3.

26. Petitioners believe that they have a right, guaranteed by the First Amendment to the Constitution, of association, which is derived from the expli-

cit prohibition against laws abridging "the right of the people peacably to assemble, and to petition the government for a redress of grievances." Petitioners believe that that right of association is extended by the Fourteenth Amendment to the states and to all who act in the name of the state, such as the Secretary of State and the Director of Elections of Massachusetts in this instance, the seven named justices of the Supreme Judicial Court of Massachusetts in this instance and to the officials of the democratic party of Massachusetts and that party itself in this instance inasmuch as the party and its officials have arrogated to themselves a power to make law superseding that passed by the state's legislature.

27. Petitioners believe that in this instance they have been deprived of that freedom of association by the actions of the defendants below and the respondent justices. As a price of their association with the democratic party, the state party is attempting to coerce them, and so far has succeeded in doing so, into giving up their rights as set out above. That the state court has sought to justify this travesty in the name of freedom of association does not give these actions any validity. The doctrine that freedom of association includes an inherent right in political parties to coerce candidates not to run when they qualify under the legislature's prescription, and voters not to vote for a candidate of their choice who meets the requirements of that pre-

scription, is pernicious and false. Freedom of association most decidedly does not include the power in a major political party to exact such a surrender of constitutional rights as the price of effective participation in the political process. This would defeat the very purpose of this extension of the right of the people peacably to assemble, which is to further freedom of communication and let the voice of the people be heard so that they may participate effectively in the political process.

28. To exact this price from petitioners as a price for their participation in one of the two major parties and, particularly, to do so in the middle of a primary nomination campaign, as was done here, deprives them of their liberty to be a candidate and to vote, respectively,

as set out above, in violation of the Fifth and Fourteenth Amendments and constitutes a kind of involuntary servitude as prohibited by the Thirteenth Amendment.

29. By refusing to act within the time frame noticed by the complaint as necessary to speedy and effective relief, i.e., before the September 14, 1982 statewide Massachusetts primary, by refusing preliminary relief without even considering the basic constitutional issues raised by Count II and by conspicuously avoiding even mentioning the issues thus raised by the complaint, the same violations of the provisions of Article I, Section 4, Clause 1 of the Constitution and of the First and Fourteenth Amendments, the courts below, petitioners contend, have acted in concert with the defendants below, in the hope that these matters can ultimately be

dismissed as moot, or the petitioners' resources exhausted, or both, since these unconstitutional acts complained of are fraught with political repercussions which courts often seek to avoid.

30. The effect of these actions and inactions, in the present instance, has been to deprive petitioners of that equal protection of the laws guaranteed by the Fourteenth Amendment, since the abridgment of their rights was created by the democratic party's acts and other citizens of Massachusetts who are not members of the democratic party have not had their rights so abridged.

31. The effect has further been to abridge the privileges and immunities of the petitioners which they are entitled to as citizens of the United States, again in violation of the Fourteenth

Amendment, since such privileges and immunities include those set out above as well as that "entitlement," guaranteed by Article IV, Section 2, Clause 1 of the Constitution, on the part of citizens of Massachusetts, to all privileges and immunities of citizens in other states. All citizens of the states have the right to participate in the political process for electing United States Senators and Congressmen in accordance with the laws passed by their legislatures. Petitioners are entitled to the same.

32. As a result of the above the defendants below, the justices of the Massachusetts Supreme Judicial Court and the judges below have been and are depriving petitioners of their rights, privileges and immunities secured by the Constitution and laws under color of custom

or usage of Massachusetts which has no real sanction in the United States Constitution as purported by the Supreme Judicial Court and the Massachusetts Secretary of State in violation of 42 USC 1983.

33. These actions and inactions violate also 42 USC 1971(b) in that petitioners HESSION, PERKINS, PAULIN and SULLIVAN have all been coerced by these actions and inactions so as to interfere with their right to vote as they may choose, at the Massachusetts primary held on September 14, 1982, and by causing them to vote for Edward M. Kennedy rather than for petitioner HOPFMANN.

34. The respondent Attorney General of the United States should be enjoined in order to preserve the appellate jurisdiction of this Court, from issuing any

waiver of the "preclearance" requirement of Section 5 of the Voting Rights Act of 1965, 42 USC 1973 et seq. to the State Democratic Committee of the Massachusetts democratic party or any other appendage or organ of the Massachusetts democratic party which gives any color of authority to that party's position that it and not the legislature can determine who shall be on the ballot and should be enjoined instead to carry out his duty under 42 USC 1971(c) to obtain preventive relief for petitioners before the November 2, 1982 scheduled general election is held and to carry out his sworn duty under Article VI, Clause 3 of the Constitution to support the Constitution, which includes acting not only to not give the color of the authority of his office to such a request

but also actually to see that the Constitution is upheld.

VI. JURISDICTION BELOW

Jurisdiction was conferred on the United States District Court for the District of Massachusetts by 27 USC 1331, 1343, 1344, 2201, 2203, by 42 USC 1973 et seq., and 42 USC 1981 and 1983; by the United States Constitution, Article I, Section 4, Clause 2; Article I, Section 5, Clause 1; Article IV, Section 2, Clause 2, Article VI, Clause 2 and the First, Fifth, Ninth, Tenth and Thirteenth, Fourteenth and Seventeenth Amendments; and on the three judge panel below by the same provisions of and amendments to the Constitution of the United States and by 42 USC 1973c and 28 USC 2284. Every federal court, once constituted, has jurisdiction over questions of deprivation of rights guaranteed by the Constitution of the United States.

VII. REASONS FOR GRANTING THE WRITS

A. THE CLEAR MANDATE AND HOW IT WAS IGNORED

There is scarcely a clearer mandate in the Constitution of these United States than that of Article I, Section 4, Clause 1. The original words can hardly be improved upon:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; .."

Only Congress itself is given by the Constitution the power to "make or alter" such "Regulations" as the legislature of each state shall prescrive. (Continuing to the conclusion of Article I, Section 4, Clause 1):

> "... but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators."

In the debates in the Virginia Convention, James Madison replied to James Monroe and explained for all time to come why this clear provision was made, as quoted by this Court in United States v. Gradwell, et al., 243 U.S. 476, 484, 61 L.Ed. 857, 37 S.Ct. 407 (1917):

> "It was found impossible to fix the time, place, and manner, of election of representatives in the constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government,, in order to enable it to produce uniformity, and prevent its own dissolution ... were they exclusively under the control of the state govern ment, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The

> power appears to me satisfactory, and as unlikely to be abused as any part of the constitution." Records of the Federal Convention, Farrand, vol. 3, p. 311.

As unlikely as it may have seemed to James Madison at that time, this power, as mandated to the legislatures of Massachusetts, and other states, by the Constitution, with the reserved power in Congress itself to "make or alter" has been clearly contested and undermined in the present instance by the leaders of the democratic party of Massachusetts, by the justices of the Supreme Judicial Court of Massachusetts, by the Secretary of State of that Commonwealth and, under him and in his office, by the Director of Elections of Massachusetts.

So intent were the Founding Fathers on preserving the role of Congress itself

in this regard that they specifically provided that each house of Congress itself should be the "judge" of any controversies concerning elections which might arise, in Article I, Section 5, Clause 1: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, ..."

Pursuant to this mandate, the legislature of Massachusetts has set out the laws regulating the election of senators and representatives in Congress, as United States Senators and Congressmen are called in Chapter 53 of the Annotated Laws of Massachusetts, by grouping these offices with others pertaining only to the state, such as governor, lieutenant-governor, etc. No special section treating candidates for federal office separately or differently from candidates

for state office has been enacted in Massachusetts The entire legislative prescription, with a few exceptions relating to municipal and other lesser offices which are not relevant here, is set out in Chapter 53 of the Annotated Code of Laws of Massachusetts.

It is important to understand this in the present case because it is the legislative prescription for elections as a whole, including both state and federal candidates, which the Supreme Judicial Court of Massachusetts dealt with in its Advisory Opinion of April 23, 1982, to the governor, in which it propounded the constitutional theory which then lead to the defendants below depriving petitioners of their constitutional rights in the manner complained of. Petitioners contend that this constitutional theory was pro-

pounded by the Supreme Judicial Court in excess of its jurisdiction with regard to the offices of "senator in congress" and "representative in congress" in particular and further, that it was also unconstitutional in that it was grounded on a false assumption about the First Amendment rights which a political party may have as distinguished from the individual members of the party. Even if such rights may be extended to a political party, petitioners contend, assuming arguendo that they can be, the application made of the right of freedom of association in this instance is not only in error, but actually stands the doctrine on its head. For, if correctly applied in this instance, the freedom of association right derived from the First Amendment would require

the opposite result from that which occurred here.

With regard to these last two arguments, it should be noted that they might apply to the non-federal candidates covered by the prescription of Chapter 53 of the Massachusetts code as well. Petitioners do not deal with that question in this petition. It is important to understand, however, that Chapter 53 deals with both federal and non-federal candidates and that none of the actions of the state officials complained of below or the actions of the justices of the state court or the actions of the court below have made any attempt to distinguish between the treatment of federal candidates and that of state candidates. In fact, the strongest evidence that petitioners are being deprived of their rights by the

deliberate inaction of the lower courts is the Memorandum and Order issued by Judge McNaught on June 22, 1982, which convened the three judge court below. In it the lower court refers to "similar actions," which "have been begun by other persons in the courts of the Commonwealth of Massachusetts ... ." The lower court then voted: "... and in open court on June 21, 1982, the parties advised me that issue has been joined and the matter formerly before Mr. Justice Liacos has now gone to the full bench." While it is true that the parallel proceeding referred to was similar, it clearly involved, and the court below knew this, a state office, the lieutenant-governorship. Such a state office would not be affected by Article I, Section 4, Clause 1 of the Constitution

of the United States, the violation of which was the gravamen of Count II of the complaint below. Yet the lower court totally ignored this salient fact.

This avoidance behaviour became even more pronounced in the Memoranda and Orders from the lower courts of July 7, 1982, in which each of the lower courts denied the requested preliminary relief. It is irregular, indeed, that in discussing the question of the prospect of reasonable success on the merits, neither the three judge court nor the single judge court ever mentioned the evident fact that the clear mandate of Article I, Section 4, Clause 1 had been violated. In fact, despite its being so clearly the gravamen of Court II of the complaint, neither court mentioned this constitutional provision at all. Yet it is the central and governing provision

which immediately disposes of the entire case.

The Opinion of the Justices of the Supreme Judicial Court of Massachusetts which was rendered to the governor on April 23, 1982, refers to "General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1" and states, quoting from § 44, that: "'(t)he nomination of candidates for nomination at State primaries shall be by nomination papers.'" The advisory opinion does not then quote the rest of section 44 of chapter 53, but a reading of that section makes it crystal clear that "senators in congress" and "representatives" in congress are being considered right along with the state offices of governor, lieutenant governor, attorney general, state secretary, state treasurer, state auditor and so on.

Hence, from April 23, 1982, on, every action or inaction complained of in this petition was done or not done, as the case may be, with the full knowledge that every decision and every failure to decide involved the nominating process for United States Senator and that applicable provisions of the Constitution of the United States and of federal law were ruling and preempted all state law. Further, it is knowledge that all the defendants and respondents are charged with as is the knowledge that nomination races for state office are not subject to the provisions of the constitution that specifically apply to the races of congressional or senatorial candidates. Nor are such state office races governed by the Federal Election Campaign Act. Other federal laws and other constitutional rights

arguably could be violated here even were a contest for the nomination for a state office involved, but it is the central issue of the continuing failure to take cognizance of the existence of Article I, Section 4, Clause 1, that has over and over again resulted in the deprivation of the rights of the petitioners and provides the reason why this Court must act. Such continued ignoring cannot be accidental. Can so many learned jurists and high officials plead ignorance of the Constitution as a legitimate defense, a document they are sworn to uphold.

Consider: If the justices of the Supreme Judicial Court had considered, in their opinion, Article I, Section 4, Clause 1, they could not have decided as they did in the Advisory Opinion of April 23, 1982, without weighing it against their

tenuous theory of freedom of association as regards the offices of senator and representative in Congress. This would have then exposed their whole brummagen theory and it would have collapsed. For the same concern for assuring that elections were made by the people that led to the Seventeenth Amendment would then have had to have been dealt with and thus would have in turn exposed the fallacious nature of the freedom of association theory expoused in that decision. If the party leaders in propounding the adoption of the rule despite the manifest will of the legislature and in enforcing it, had taken formal cognizance of this Constitutional provision, they would not have been able to clothe such a naked power grab with any trappings of legality. If the Secretary of State of Massachusetts

had had to take formal cognizance of Article I, Section 4, Clause 1, he could not have issued the letter he did to petitioner HOPFMANN which excluded petitioner from the ballot. And last but not least, had the judges below taken cognizance of this provision of the Constitution, which was so clearly presented to them in the complaint, they would have been compelled to grant the requested preliminary relief. They could not then have ignored the specious reasoning underlying the First Amendment theory propounded in the advisory opinion of the Supreme Judicial Court.

Further, the judges below were bound to consider the prescription of the Massachusetts legislature as set out in Chapter 53 of the Massachusetts code as a rule of decision in the proceeding below by

28 U.S.C. 1652 unless they could find that the "Constitution or treaties of the United States or Acts of Congress otherwise require or provide, ..." The court has made no determination that the Constitution otherwise provides, nor could it do so without considering Article I, Section 4, Clause 1, and the Seventeenth Amendment. It certainly had no authority in this case to defer decision until a state court should decide about a state lieutenant-governor's race and should have regarded the prescription of section 44 of chapter 53 of the Massachusetts Code as a rule of decision without hesitation. Party charters are not rules of decision in the federal courts.

Nor should the Attorney General of the United States even be considering issuing a waiver of the "preclearance"

required under Section 5 of the Voting Rights Act of 1965 to any branch of the defendant below, the Democratic State Committee of Massachusetts, without considering the clear provisions of Article I, Section 4, Clause 1, and the Seventeenth Amendment. For he is sworn to uphold the Constitution, not assist in its subversion. He should not even be considering approving the act of a party in changing the voting laws of a state. Only the states' legislatures and the Congress have authority to make such changes, not parties. He should be enjoined not only not to issue such a waiver, but to carry out his duty to instruct the democratic party of Massachusetts that they have no authority to make such a change in voting laws which can only be made by authorities that are elected by the people.

VIII. CONCLUSION

Wherefore, petitioners pray that this Honorable Court issue the writs prayed for, or one or more of them, as this Court may deem appropriate, directed to the aforesaid judges of the courts below, compelling them to hear immediately the constitutional issues raised herein and to prohibit them from delaying any further.

Petitioners further pray that the justices of the Supreme Judicial Court be enjoined from representing that either they or any advisory opinions rendered by them, or any opinions involving state candidates have any effect upon candidates for the office of United States Senate and from representing that they have any jurisdiction to judge the times, places and manner of choosing United States Senators, and to prohibit them from the same with

regard to the present petitioners and to order them to issue an order so clarifying their advisory opinion of April 23, 1982 forthwith.

Petitioners further pray that the Secretary of State of Massachusetts be ordered to declare the state primary of September 14, 1982, in Massachusetts, for United States Senator, to be void and the same for the democratic party convention "election" of May 21 and 22, 1982, and to hold a special primary as soon as practicable and a special general election thereafter, and that the general election for United States Senator from Massachusetts which is currently scheduled be enjoined or prohibited accordingly.

Petitioners further pray that the defendants, Chester G. Atkins and the Democratic State Committee, be enjoined

prohibited and/or compelled accordingly and that the respondent Attorney General of the United States be enjoined and prohibited from issuing any waiver of "preclearance" under Section 5 of the Voting Rights Act of 1965 to the defendant, The State Democratic Committee of Massachusetts and that he be compelled to carry out his duty under the Constitution and the laws to ascertain if petitioners' rights have been violated and for such other and further relief as may to the Court seem just and equitable.

VERIFICATION

District of Columbia)
City of Washington) ss.

LAURENCE A. ELGIN, being duly sworn, deposes and says that he is one of the attorneys for petitioners herein, that he has prepared the petition, and read the same; and that the statements contained therein are true and correct, except as to matters on information and belief, and as to them he believes them to be true.

Laurence A. Elgin

Subscribed and sworn to before me this 30th day of September, 1982.

NOTARY PUBLIC

My commission expires: November 30, 1986

Respectfully submitted,

ATTORNEYS FOR PETITIONERS

Laurence A. Elgin
Suite 705
1000 16th Street, N.W.
Washington, D. C. 20036
(202) 857-0073

Frederick A. Goldstein
Suite 200
2640 Hollywood Blvd.
Hollywood, Florida 33020
(305) 925-3358

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing PETITION FOR PROHIBITION AND/OR MANDAMUS AND/OR INJUNCTION were served upon the three judges below, the defendants named below and the additional respondents named herein in the following manner:

Honorable Justice Walter Jay Skinner
United States District Court, Rm1525
Post Office and Court House
Boston, MA 02109

Honorable Justice John McNaught
United States District Court,Rm 1525
Post Office and Court House
Boston, MA 02109

Honorable Justice Frank M. Coffin
Circuit Court of Appeals, Room 1606
Post Office and Court House
Boston, MA 02109

Honorable Neil Lynch
Supreme Judicial Court
New Court, Room 1412
Boston, MA 02108

Honorable Ruth I. Abrams
Supreme Judicial Court
New Court, Room 1412
Boston, MA 02108

Honorable Edward F. Hennessey
Supreme Judicial Court, Room 1412
New Court, Room 1412
Boston, MA 02108

Honorable Paul J. Liacos
Supreme Judicial Court
New Court, Room 1412
Boston, MA 02108

Honorable Joseph Nolan
Supreme Judicial Court
New Court, Room 1412
Boston, MA 02108

Honorable Francis O'Connor
Supreme Judicial Court
New Court, Room 1412
Boston, MA 02108

Honorable Herbert P. Wilkins
Supreme Judicial Court
New Court, Room 1412
Boston, MA 02108

Michael Joseph Connolly
Secretary of State of Massachusetts
State House
Boston, MA 02133

Marcia Molay
Director of Elections
1 Ashburton Place
Room 1705
Boston, MA 02108

Francis X. Bellotti
Attorney General of Massachusetts
1 Ashburton Place
Boston, MA 02108

Chester G. Atkins, Chairman
Democratic State Committee
11 Beacon Street
Boston, MA 02201

Democratic State Committee
of the Commonwealth of Massachusetts
11 Beacon Street
Boston, MA 02201

Personally by Miss Lynn C. Simone of 119 Revere Street, Winthrop, Massachusetts on October 1, 1982 in accordance with affidavits filed herewith; and upon

William French Smith
Attorney General of the
United States
Main Justice Building, Rm. 5614
United States Department of Justice
Washington, D. C.

Rex E. Lee
Solicitor General of the
United States
Main Justice Building, Rm 5614
United States Department of Justice
Washington, D. C.

Personally by Laurence A. Elgin, Esquire, on October 1, 1982.

_____
Laurence A. Elgin

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

In Re: ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN,

Petitioners

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS AND/OR INJUNCTION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

APPENDIX

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MEMORANDUM AND ORDER ON REQUEST FOR THE CONVENING OF A THREE JUDGE COURT, in the United States District Court for the District of Massachusetts, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Civil Action No. 82-1530-MC, dated June 22, 1982, signed by the Honorable John J. McNaught.

This matter came on for a hearing on a motion for a stay. The plaintiff Alwyn (sic) E. Hopfmann and three registered voters filed suit against officers of the Commonwealth of Massachusetts and the Democratic State Committee, challenging the validity of the Massachusetts State Democratic Committee charter and its

"15% rule". The plaintiffs request the convening of a three-judge court, alleging their right to such court under 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

Similar actions have been begun by other persons in the courts of the Commonwealth of Massachusetts, and in open court on June 21, 1982, the parties advised me that issue has been joined and the matter formerly before Mr. Justice Liacos has now gone to the full bench. It appears that the issue may well be decided by the Surpeme Judicial Court and that an order may be entered by the full bench with an opinion to follow. The parties reported to me that there is no reason to believe that the Supreme Judicial Court will delay in making its decision.

After hearing, I have decided to grant a stay of this action, but have re-

quired that responsive pleadings be filed in the usual course. The stay is to expire upon the issuance of an order by the Supreme Judicial Court.

The defendants in the action before me have filed a motion to dismiss in the nature of a motion based upon a failure to file a claim upon which relief may be granted. F.R.Civ.P. 12(b)(6).

A dispute has arisen as to whether I, as a single judge, am empowered to hear and decide on a motion to dismiss under these circumstances. Upon consideration, I am of the opinion that if such a motion is to be granted, it must be granted by a court of three judges and not by the single judge who initiates the three-judge proceedings. See Svejkovsky v. Honorable Edward A. Tamm, 326, F.2d 657 (D.C. Cir. 1963).

Accordingly, I intend to request the convening of a three-judge panel to hear and determine the motion to dismiss, in the event that the ruling which eventually will be made by the Supreme Judicial Court of the Commonwealth of Massachusetts is not dispositive of the entire problem.

/S/ John J. McNaught
United States District Judge

MEMORANDUM AND ORDER DENYING PRELIMINARY INJUNCTION in a special three-judge court formed pursuant to 42 USC § 1973c and 28 USC § 2284, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC. Dated July 7, 1982.

This action came on to be heard on plaintiffs' request for a preliminary injunction and motions to dismiss by the defendants.

After argument and deliberation, the court cannot say at this juncture of the proceedings that there is a reasonable likelihood of success of the merits of the request for declaratory judgment. Specifically, the absence of a sufficient likelihood of success as to the issues of (1) whether the Commonwealth of

Massachusetts is a "covered jurisdiction" under the Voting Rights Act and (2) whether the complaint is defective in its failure to contain a good-faith allegation of racially discriminatory intent or impact requires a denial of the injunction.

July 7, 1982

/s/ Frank M. Coffin,
Chief Judge U.S. Court
of Appeals for the
First Circuit

/s/ Walter J. Skinner,
United States District
Judge

/s/ John J. McNaught
United States District
Judge

MEMORANDUM AND ORDER issued by the Honorable John J. McNaught as a single court judge below, Alwin E. Hopfmann, et al., Plaintiffs, v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC, dated July 7, 1982.

As a single judge, I adopt the reasons set forth by the members of the three-judge court for the denial of the preliminary injunctive relief requested by the plaintiffs under the Voting Rights Act. As a single judge, furthermore, I am unable to find that there is a reasonable prospect of success on the merits insofar as plaintiffs' complaint is bottomed upon allegations of a violation of rights of plaintiffs under the First and Fourteenth Amendments of the Constitution of the

United States, or upon Articles VIII and IX of the Constitution of the Commonwealth of Massachusetts in its Declaration of Rights, or upon the theory of constitutional equitable estoppel. It is my opinion also that the plaintiff Hopfmann has not demonstrated a reasonable prospect of success on his cause of action resting upon Title 42 § 1983.

Preliminary injunctive relief denied.

The motions to dismiss on the theories of liability within the province of the single judge are under advisement as of this date.

/s/ John J. McNaught
United States District Judge

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE BRENNAN OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Your application for a stay in the above-entitled case has been presented to Justice Brennan, who has endorsed thereupon the following:

"Denied

Wm. J. Brennan, Jr.

7/8/82"

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE REHNQUIST OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Pursuant to your request of July 9, 1982, your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed the following on your request:

"7/9/82

Denied

WHR"

App. F-1

OPINION OF THE JUSTICES TO THE GOVERNOR, Supreme Judicial Court of Massachusetts. April 23, 1982. 385 Mass. 1201.

A question was propounded by the Governor of the Commonwealth of Massachusetts to the Justices of the Supreme Judicial Court with respect to the nomination of party candidates for placement on the state primary ballot. The Justices of the Supreme Judicial Court, gave answer that proposed mandatory statute providing that "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination of the state primary" would abridge the constitutional rights of the party and its members to

associate while allowing candidates to be placed on the state primary ballot in contravention of the party's charter.

Question answered.

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the questions set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "(t)he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval

House Bill No. 5852, which would amend c.53, § 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the

proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H.5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c.3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

> "1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of

the vote at the party convention?

"2. Would enactment of H.5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?"

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important questions of law" and to "solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. Answer of the Justices, 362 Mass. 914, 916-917, 291 N.E. 2d 598 (1973). As the Justices have ad-

vised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature having some action in view has serious doubt as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 373 Mass. 867, 871, 366 N.E. 2d 730 (1977), quoting from Answer of the Justices, 148 Mass. 623,625-626, 21 N.E. 439 (1889).

(1) Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. Opinion of the Justices, ___ Mass. ___, ___ _ ___, Mass.Adv. Sh.

(1981) 1361, 1381-1382, 424 N.E. 2d 1092. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expediency of proposed legislation. Answer of the Justices, 319 Mass. 731, 734, 66 N.E. 2d 358 (1946). Opinion of the Justices, 314 Mass 767, 771-772, 49 N.E. 2d 252 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1 § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubt about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See Opinion of the Justices, 314 Mass. 767, 772, 49 N.E. 2d

252 (1943).

"The (Democratic Party of the Commonwealth) and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments ... . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' Williams v.

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10-11, 21 L.Ed. 2d 24 (1968). Moreover, '(a)ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957); see NAACP v. Button, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L.Ed.2d 405 (1963)." Cousins v.Wigoda, 419 U.S. 477, 487-488, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122n22, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981), quoting L. Tribe, American Constitutional Law 791

(1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. Democratic Party of U.S. v. Wisconsin, supra.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G.L. c 53, § 2. Voting in party primaries is limited to enrolled party members and unenrolled voters who enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Apart from Article Six, Section III, of the State Democratic party charter, in order to be placed on a party's primary

ballot, a candidate for statewide office must be an enrolled member of that party, G.L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or unenrolled. G.L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership. 1/

1/ As of February, 1980, 39.9% of all registered voters in the Commonwealth were unenrolled. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh.(1981) at 97 415 N.E.2d 832.

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling

interest in limiting the number of candidates in order to prevent voter confusion. American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-06, 39 L.Ed.2d 744 (1974). Storer v. Brown, 415 U.S. 724, 732, 94 S.Ct. 1274, 1280, 39 L.Ed. 2d 714 (1974). A political party has a parallel interest.

If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 46, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional

muster, it must serve a compelling State interest, Sears v. Secretary of the Commonwealth, 369 Mass. 392, 397, 341 N.E. 2d 264 (1975), and do so with as little infringement on constitutional rights as possible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support.

American Party of Texas v. White, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974). This applies to the conduct of primary elections, Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d L (1973), which are an important part of the procedure by which the ultimate office holder is chosen. Sears v. Secretary of the Commonwealth, supra, 369 Mass. at 398, 341 N.E.2d 264. These interests are served by the requirement that each candidate for statewide office obtain the signatures of at least 10,000 registered voters on nomination papers, G.L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter

requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion.

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in Democratic Party of U.S. v. Wisconsin, supra. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any

registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." Id. 450 U.S. at 122, 101 S.Ct. at 1019. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in conjunction with §§ 44, 46, and 37 of G.L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members

of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

(2) We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the

Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

EDWARD F. HENNESSEY

HERBERT P. WILKINS

PAUL J. LIACOS

RUTH I. ABRAMS

JOSEPH R. NOLAN

NEIL L. LYNCH

FRANCIS P. O'CONNOR

ORDER OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SJC-2889, dated July 6, 1982, Frederick C. Langone, et al. v. Secretary of the Commonwealth, et al.

On June 18, 1982, the Single Justice reserved and reported the following questions of law presented by this action:

1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth?

2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to

obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth,' but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?

Upon consideration of the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary of State must give effect to the relevant charter provisions. Accordingly, we answer the questions reported, "no."

A rescript will issue forthwith with an opinion or opinions to follow.

App. H-1

ARTICLE SIX, SECTION III, OF THE CHARTER OF THE MASSACHUSETTS DEMOCRATIC PARTY, adopted at Convention of May 21-22, 1982.

There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

HOUSE BILL NO. 5852 of the State Legislature of the Commonwealth of Massachusetts (1982).

An Act ensuring that candidates nominated by nomination papers shall have access to the state primary ballot.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 44 of Chapter 53 of the General Laws, as amended by Chapter 136 of the Acts of 1977, is hereby further amended by adding after the first sentence the following sentence: -- Notwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary.

App. J-1

RECEIPT FOR NOMINATION PAPERS issued to Alwin E. Hopfmann, petitioner herein, by the Office of the Massachusetts Secretary of State.

Date: 5-28-82 Party: Democratic

Candidate's Name: Alwin E. Hopfmann

Office: Senator in Congress

District: Comm of Mass

Signatures Needed: 10,000

Certified Signatures Filed: 10,798

Candidate's Statement: None

Ballot Status:

...

Not yet on ballot: Reason: Democratic Charter (box checked)

...

Checklist: (two checked)

Written Acceptance (checked)

Enrollment Certificate (checked)

(Illegible)

App. J-2

Filed by: Alwin E. Hopfmann

Daytime Phone: 422-6351

Rec'd By: (Illegible)

Residential Address: 29 Tuttle Rd.
Sterling, Mass 01564

N.B.: Underscoring indicates hand-written information entered onto form.

App. K-1

LETTER OF MARCIA MOLAY, DIRECTOR OF ELECTIONS to Alwin E. Hopfmann, petitioner herein, dated May 28, 1982 denying placement of his name on the Democratic state primary ballot.

For the reasons given in the enclosed statement, Secretary Connolly has decided to follow the April 23 Supreme Judicial Court Opinion of the Justices, 385 Mass. 1201 (1982). Because the enclosed letter from the Democratic State Committee does not indicate your compliance with the party charter, we are unable to place your name on the Democratic state primary ballot.

We have already issued to you our receipt reflecting this decision. Please contact this office if you have any questions about this decision.

App. L-1

LETTER OF JULY 6, 1982 FROM JAMES F. SCHOENER, OF THE FIRM OF MILLER, CANFIELD, PADDOCK AND STONE, COUNSEL OF RECORD BELOW TO DAVID R. HUNTER, VOTING SECTION, CIVIL RIGHTS DIVISION, UNITED STATES DEPARTMENT OF JUSTICE. Case No. 82-1530-MC.

On behalf of our clients, Alwin E. Hopfmann, Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan, plaintiffs in an action in the United States District Court for the District of Massachusetts, Case No. 82-1530-MC against Michael Joseph Connolly, Secretary of the Commonwealth of Massachusetts, Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, Chester G. Atkins, Chairman of the Democratic State Committee of Massachusetts, and the Democratic State Committee of Massachusetts, involving a

Voting Rights Act of 1965 violation, we wish to register our strenuous objection to the submission under Section 5 made by the Democratic Party of the Commonwealth of Massachusetts ("Submission").

The proposed change in the ballot access law of the Commonwealth of Massachusetts adds the further qualification that a candidate receive an endorsement by 15% of the delegates at a Democratic "endorsing convention" in order to be placed on the Democratic primary ballot ("15% Rule") to the present strict requirement of nominating petitions duly signed by 10,000 voters either enrolled in the Democratic party of the Commonwealth of Massachusetts or unenrolled. Our objection to the submission is based on the variety of problems raised by the submission that have significant detrimental

implications for minority voters generally, as well as our clients (one of whom is a member of a minority group).

1. The impact of the 14% Rule will fall far more heavily upon minority candidates who usually have geographically circumscribed constituencies. Their initial support base may well be sufficient to allow them to meet the nominating petition requirements but insufficient for them to conduct a state-wide pre-primary campaign in 321 various Democratic caucus jurisdictions.
2. The 15% Rule lengthens the primary campaign time period backwards prior to and into the Democratic caucus period and requires candidates to obtain support in

many geographically spread caucus jurisdictions. Moreover, most of the 321 caucus jurisdictions are without significant minority activity, effectively foreclosing the ability of minority candidates with geographically circumscribed support to even place their name on the ballot.

3. The 15% Rule will tip the balance of political power even more in favor of incumbent office holders who have state-wide contacts and who can safely ignore a geographically concentrated minority community.

4. Historically, party endorsement conventions have been used to discriminate against minority

participation in party activities. There is no showing that the Massachusetts Democratic 15% Rule will not or does not have the effect or the potential effect for such discrimination.

5. A significant avenue of minority participation in Massachusetts politics will be foreclosed by the 15% Rule because the requirements for independent candidacy are so much more burdensome than the requirements for primary ballot access, i.e., 60,000 signatures for ballot access as opposed to the present requirement of 10,000 signatures on a nomination petition to obtain access to the primary ballot.

6. The assertion that the Voting Rights Act of 1965 "merely" applies due to census differences is irrelevant and apparently an attempt to obtain a "back door bail-out" from the strictures of the Voting Rights Act. The implication that the Voting Rights Act ought not to apply or be involved (because of the "mere" technical application of the Voting Rights Act) ignores the record of school and community discrimination that has continued for many years in the Boston metropolitan area against minorities and, more importantly, the command of the legislation itself and its judicial interpretation.

7. The Democratic Party and the Secretary of State have already applied the 15% Rule and denied candidates, including Alwin E. Hopfmann, the right to ballot access although they have met the requirements of state law. This denial occurred before any preclearance of the 15% Rule was sought. The deprivation resulting from the unprecleared 15% Rule should not be applied retroactively to unfairly deprive otherwise qualified candidates of ballot access.

8. The 15% Rule seriously impinges fundamental rights to be a candidate under the Massachusetts Constitution and the United States Constitution.

If you have any questions or comments concerning these problems, or desire further elucidation of them, please do not hesitate to contact me.

SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT under 42 U.S.C. § 1973c and 28 C.F.R. § 51 as amended by 46 Fed. Reg. 870 (1981) on behalf of the Democratic Party of the Commonwealth of Massachusetts. Undated.

In compliance with the procedures for the administration of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c (1981) and the preclearance requirements established thereunder.[1] the Democratic State Committee of the Commonwealth of Massachusetts on November 17, 1979. This submission is offered on behalf of the Democratic Party with respect to the covered jurisdictions of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland and Wrentham pursuant

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1/ 28 C.F.R. § 51, as revised by 46.

to 28 C.F.R. §§ 51.7, 51.21(b).

The towns in question have been singled out because the Director of the Bureau of the Census has determined that fewer than 50% of the persons of voting age residing in said towns voted in the 1968 presidential election.2/ As such, the Voting Rights Act mandates that, commencing November 1, 1968, the aforementioned towns must obtain preclearance before any election law changes affecting said covered jurisdictions can be implemented. It is the position of the Democratic State Committee, as it is of the Attorney General of Massachusetts, that the Voting Rights Act applies to these towns because the standards applied by the federal census takers differ from those of the state

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2/ Fed. Reg. 870 (1981).
30 Fed. Reg. 16913 (1974).

census takers, and not because of any discriminatory voting practices.

Accordingly, the Democratic Party of the Commonwealth of Massachusetts with respect to the named towns seeks that preclearance by this submission.

DESCRIPTION OF THE CHANGE AFFECTING VOTING

The Democratic Party of the Commonwealth of Massachusetts seeks preclearance of Article Six, Section III of the Charter of the Democratic Party (see Appendix A) which provides:

> 'There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democratis nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives

at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

The practice with regard to placing names on primary ballots in effect prior to the adoption of Article Six, Section III (the 15 Percent Rule") is set forth by statute 3/and applies to all political parties. Under this statutory requirement, "the nomination of candidates for nomination at state primaries shall be by nomination papers" 4/ signed by a minimum of either 5,000 or 10,000 voters, depending on the office sought. Although the statute remains in effect and sets forth the minimum number of

3/ Mass. Ann.Laws ch.53, § 44 (Law Co-op. 1978).

4/ Id.

signatures which any party candidate must file to be included on the primary ballot, the implementation of the 15 Percent Rule would prevent the inclusion on the primary ballot of any candidate who did not receive at least 15 percent of the votes of convention delegates present and voting on any one convention ballot.

The Charter of the Democratic Party, including the 15 Percent Rule, was adopted in 1979 by a Charter Convention composed of delegates selected by local party caucuses on the basis of "one Democrat, one vote." The Charter was drafted by a Charter Commission which was mandated by the Party's 1977 issues convention and composed of 25 members selected by then Democratic State Committee Chairman Charles Flaherty. The Commission, which included

2 minority group members 5/ held seven public hearings across the Commonwealth before drafting the charter. A dominant theme which ran through the testimony heard by the Commission was a desire by the party members to strengthen the Democratic Party. With this theme in mind, the Commission drafted a charter designed to reestablish party influence over endorsements for nominations. By limiting nominations to those endorsed by convention and significant challengers (thereby making nomination to the primary ballot more valuable) and strengthening party discipline,

5/ In 1970, Negro and other races comprised 3.6% of the state's population. General Social and Economic Characteristics: Massachusetts, Bureau of the Census, Table 45 (April, 1972). By the 1980 census, Blacks comprised 3.9% of the population; American Indians, 0.1%; Asians and Pacific Islanders, 0.9%; and others 1.7%. Race of the Population by States; 1980 Bureau of the Census, Table 2, (July 1981).

the Commission hoped to attract non-partisan voters and to increase participation in the political process.

The Commission's draft of the Charter was circulated among local committees for criticism and adopted at two sessions of the Charter Convention held in 1979. Article Six was voted on at the November 17, 1979 session and was adopted by the required two-thirds vote, 560 to 270. Prior to the vote, Section III was amended to reduce the challenge requirement from 20 percent to 15% of an endorsing convention vote.

The 1982 Democratic Endorsing Convention was held on May 21-22 and consisted of 3300 delegates elected by 100,000 participants at caucuses open to any registered Democrat. An amendment was presented to the Convention to delete the 15 Percent

Rule from the Charter but was defeated on a roll-call of 1,698 to 468. A second amendment to postpone the effective date of the 15 Percent Rule was then proposed and defeated on a voice vote.

The 15 Percent Rule was examined recently in an advisory opinion 6/ issued by the Justices of the Massachusetts Supreme Judicial Court at the request of the Governor of the Commonwealth. In that opinion, the Justices held that the rule promulgated by the Democratic Party was within the party's constitutionally-protected right of political association and that proposed legislation which would circumvent the rule would abridge that right.

6/ Opinion of the Justices, 385 Mass. 1201 (1982). (See Appendix B).

There is no anticipated adverse effect on members of minority groups as a result of the enforcement of the 15 Percent Rule. In drafting the Charter with the aim of strengthening the Party, the Commission sought to make the Party a more effective voice in the political process. Some commentators have argued that participation in the political parties has enabled minorities to increase their influence and to gain greater control over their destinies 7/ and that the weakening of parties has led to reduced participation by minorities. 8/ By making the convention endorsement meaningful and thereby reducing the need to mount an

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7/ Dobel & Stockton, Unreforming the Parties, Commonsense, Summer, 1979, at 25. (See App. c).

8/ Id. at 27.

expensive statewide campaign, the Party anticipates that the change will benefit candidates, especially those with limited campaign resources.

While the 15 Percent Rule should have the collateral result of increasing minority group participation in the Democratic Party, the Charter expresses this goal directly in Article Seven, Affirmative Action and Outreach. (See Appendix A). This article of the Charter states the Party's support for affirmative action programs, identifies the Party's affirmative action and outreach goals, establishes a sub-committee to formulate plans for affirmative action throughout the Party and sets forth steps to implement those plans. Through this commitment, the Party anticipates even greater minority group involvement.

The 15 Percent Rule has not yet been enforced in an election but the Secretary of the Commonwealth of Massachusetts has indicated his intention to apply the rule with regard to the primary to be held on September 14, 1982 by refusing to accept nomination papers from candidates who did not receive at least 15% of the vote on any ballot at the convention held on May 21-22, 1982. In preparation for that primary, the Secretary has stated that he must make a determination of candidates to be included on the ballot by July 9, 1982 in order to have the ballots printed in time for the primary. The 15 Percent Rule is at present an issue in three pending actions: Langone v. Connolly, Docket No. 82-214-Civil in the Supreme Judicial Court of Massachusetts; Hopfmann v. Connolly, Case No. 82-1530-MC in the

United States District Court, District of Massachusetts; Pressman v. Connolly, Case No. 82-1431-C in the United States District Court, District of Massachusetts.

According to the Office of the Attorney General of the Commonwealth of Massachusetts, that office has no record that the prior practice for nomination to state primaries as mandated by statute 9/ has been precleared. At the time the preclearance requirement of the Voting Rights Act became effective with regard to the nine Massachusetts towns, the pertinent statute provided that nomination to state primaries was by nomination papers or endorsement by a state convention. 10/ With the repeal of the statutory provisions for

9/ Mass. Ann. Laws ch. 53 § 44 (Law Co-op. 1978).

10/ Mass. Ann. Laws ch. 53, § 44 (Michie/Law Co-op. 1964).

conventions in 1973, the statute was amended to remove the alternative method of qualification for the ballot by endorsement by convention. 11/ It is the position of the Democratic State Committee that if these changes are to be considered changes affecting voting under Section 5 of the Voting Rights Act either the individual covered jurisdictions or the state on their behalf were responsible for making submissions for preclearance. 12/

Due to the July 9, 1982 deadline for preparation of ballots for the primary election and the pending litigation involving the 15 Percent Rule, the Democratic State Committee requests that this submission be given expedited consideration.

12/ 28 C.F.R. § 51.25(o).

Without expedited consideration, the Massachusetts electoral process would suffer substantial disruption.

App. N-1

CONSTITUTIONAL AND STATUTORY PROVISIONS:

A. CONSTITUTIONAL PROVISIONS

1. Article I, Section 4, Clause 1:

> "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators."

2. Amendment XVII, Clauses 1 and 2:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ... . When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; Provided, That the legislature of any State may empower the executive thereof to make tempo-

rary appointments until the people fill the vacancies by election as the legislature may direct."

3. Article I, Section 5, Clause 1:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, ..."

4. Article IV, Section 2, Clause 2:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

5. Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

6. Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States

are reserved to the States, respectively, or to the people."

7. Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

8. Amendment XIV, Section 1:

"No State shall ... enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of ... liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

9. Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

10. Amendment V:

"No person shall be ... deprived of ... liberty... without the due process of law; ... ."

11. Amendment XIII, Section 1:

"Neither ... nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

B. STATUTES

12. Annotated Laws of Massachusetts, Chapter 53, Section 44:

"The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of ... United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters.

13. Annotated Laws of Massachusetts, Chapter 53, Section 45:

> "A nomination paper shall be valid only in respect to a candidate whose written acceptance is thereon; ..."

14. Annotated Laws of Massachusetts, Chapter 53, Section 46:

> "Every nomination paper of a candidate for state office shall be submitted on or before five o'clock post meridian of the twenty-eighth day preceding the day on which it must be filed with the state secretary to the registrars of the city or town in which the signers appear to be voters... . Each nomination paper shall be marked with the date and time it was submitted and such papers shall be certified in order of submission. Said registrars shall check each name to be certified by them on the nomination paper and shall forthwith certify thereon the number of signatures so checked which are names of voters both in the city or town and in the district for which the nomination is made, and who are not enrolled in any other

party than that whose nomination the candidate seeks, and only names so checked shall be deemed to be names of qualified voters for the purpose of nomination. The registrars shall place next to each name not checked symbols indicating the reason that name was disqualified. The certification of voters shall be signed by a majority of the board of registrars."

15. Annotated Laws of Massachusetts, Chapter 53, Section 47:

"For the purpose of certifying the names on primary nomination papers the registrars shall hold meetings on the four Tuesdays next preceding the seventh day before the final day on which such papers are required to be filed with the state secretary."

16. Annotated Laws of Massachusetts, Chapter 53, Section 48:

"Certificates of nomination or nomination papers for the office of senator in congress ... shall be filed on or before the first Tuesday in June of the year in which a state

election is to be held ... The state secretary shall forthwith issue to the candidate or other person filing such nomination papers a certificate acknowledging the time and date of the receipt thereof.

"There shall not be printed on the ballot at the state primary the name of any person as a candidate for nomination for any office to be filled by all the voters of the commonwealth ... unless a certificate from the registrars of voters of the city or town wherein such person has been a registered voter for more than ninety days and that he has been enrolled as a member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day herein provided for filing nomination papers with the state secretary is filed with the state secretary on or before such filing deadline. Said registrars shall issue such a certifi-

> cate, signed by a majority thereof, forthwith upon request of any such candidate so enrolled or of his authorized representative ... No such certificate shall be issued to any person who is a candidate for nomination for any such office, if such person has been an enrolled member of another political party during the year prior to the last day of filing nomination papers with the state secretary as provided by this section."

17. Annotated Laws of Massachusetts, Chapter 53, Section 2:

> "... candidates of political parties for all elective offices ... shall be nominated ... in primaries or caucuses ... ."

18. The Civil Rights Act of 1871, 42 USC 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

19. 28 USC 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

20. Federal Election Campaign Act of 1971, as amended, the following sections:

a) 2 USC 431(1)A

"When used in this Act: (1) The term 'election means- (a) a general special primary, or runoff election;

b) 2 USC 431(1)B

"a convention or caucus of a political party which has authority to nominate a can-

didate;

c) 2 USC 431(2):

"The term 'candidate' means an individual who seeks nomination for election, or election, to Federal office and for purposes of this paragraph, an individual shall be deemed to seek nomination for election or election-

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000;

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000;

d) 2 USC 431(3):

"The term 'Federal office' means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to the Congress;"

21. 42 USC 1971(b) and (c):

"Intimidation, threats or coercion. No person, whether acting under color of law or otherwise, shall ... coerce, or attempt to ... coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of... Member of the Senate, ... at any ... special or primary election."

"(c) Proceedings for preventive relief. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order... . Whenever a proceeding instituted under

this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

22. 2 USC 431(3):

"Whenever a State ... with respect to which the prohibitions set forth in section 4(a) (42 USCS § 1973(a)) based upon determinations made under the first sentence of section 4(b) (42 USCS § 1973(b)) are in effect shall enact or seek to administer any ... standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State ... with respect to which the prohibitions set forth in section 4(a) (42 USCS § 1973(a))

based upon determinations made under the second sentence of section 4(b) (42 USCS § 1973b(b) are in effect shall enact or seek to administer any ... standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State ... with respect to which the prohibitions set forth in section 4(a) (42 USCS § 1973b(a)) based upon determinationa made under the third sentence of section 4(b) (42 USCS 1973b(b)) are in effect shall enact or seek to administer any ... standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State ... may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) (42 USCS § 1973b(f)(2))."